Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Acceleration of Broadband Deployment:	)	
Expanding the Reach and	)	
Reducing the Cost of	)	WC Docket No. 11-59
Broadband Deployment by Improving	)	
Policies Regarding Public Rights of Way	)	
and Wireless Facilities Siting	)	

REPLY COMMENTS OF THE CITY OF EUGENE, OREGON

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REPLY COMMENTS OF THE CITY OF EUGENE, OREGON

The City of Eugene, Oregon ("City" or "Eugene"), files these reply comments in response to the opening comments filed in this Notice of Inquiry ("*NOI*") proceeding, 26 FCC Rcd 5384, released April 7, 2011.

Eugene supports the reply comments of National League of Cities, *et al.*, as well as the reply comments of other local governments and local government interests filed in this proceeding. In these reply comments, Eugene addresses only those opening comments of industry interests that attacked the City's 1997 Telecommunications Ordinance, Ordinance No. 20083,[1] and Oregon law relating to municipal authority to impose rights-of-way ("ROW") compensation and management.

INTRODUCTION AND SUMMARY

Opening comments opposing any preemptive or interpretive Commission action with respect to Section 253 or Section 332(c)(7) outnumbered those favoring any such action by an

[1] City of Eugene, Oregon Ordinance No. 20083, *codified at* Eugene, OR, Code §§ 3.400 *et seq.* (2011) ("Ordinance No. 20083").

overwhelming margin of 152 to 10. As expected, industry members were the ones that urged a need for Commission action. But their position suffers from at least two fatal flaws.

First, they offer only isolated, unverified anecdotes of supposed problems with local right-of-way or cell tower zoning requirements – an anecdotal total that, even if accepted as accurate (and as the record reveals, they are not), pales in comparison to the total number of local governments nationwide and the massive proliferation of wireless facilities and landline broadband deployment that has taken place since Section 253 and Section 332(c)(7) were enacted in 1996. In short, industry commenters offer nothing to suggest that the court remedies furnished by § 253 and § 332(c)(7) have not been, and will not be, fully adequate to protect against any abuses.

Second, the anecdotes of supposed abuses that industry does provide are inaccurate or misleading -- in some cases, so egregiously so as to raise a question about the industry commenters' good faith in making them. In these reply comments, the City will deal only with industry allegations made about Eugene, which are uniformly inaccurate *and* misleading. Industry commenters mischaracterize the City's 1997 telecommunications ordinance, they omit or misstate pertinent facts, they make representations inconsistent with those they have made to the City, and they omit, or misstate, court precedent concerning the City's telecommunications ordinance.

I. VERIZON'S ALLEGATIONS ABOUT EUGENE ARE INACCURATE AND MISLEADING.

Verizon singles out Eugene for criticism, alleging that it has imposed "excessive" and "discriminatory" ROW fees.[2] But Verizon's allegations rest on a host of inaccuracies, many of which we can only conclude are deliberate mischaracterizations and omissions.

Verizon's allegations concerning Eugene center around its obvious dislike of Ordinance 20083, adopted by the City of Eugene in 1997 after a year of public input and study of the Telecommunications Act of 1996. In particular, Verizon attacks the 7% ROW use license fee that Ordinance 20083 imposes on communications service providers using Eugene's ROW[3] and the 2% registration fee that Ordinance 20083 imposes on all communications service providers (landline or wireless) that provide service to customers in Eugene.[4] As the primary lever for its attack, Verizon attempts to use MCI's 1991, limited ROW use, franchise agreement with the City ("1991 MCI Franchise"), which pre-dated Ordinance 20083, only permitted MCI to use less than 1,000 feet of City ROW, and expired in 2006, about a year after Verizon acquired MCI.

Verizon's attack on Eugene, however, which we note is completely unsworn and unverified, is riddled with inaccuracies and deception. When these are corrected, Verizon's claims melt away.

First, Verizon conveniently neglects to mention that Ordinance 20083, and its 7% ROW fee and 2% registration fee, have been challenged in court on § 253 grounds not once, but *twice* – once in Oregon state court[5] and again in federal court[6] – and *Eugene's Ordinance 20083 fees*

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[2] Verizon Comments at 18-19, 21 & 24.

[3] Eugene, OR, Code, § 3.415(2) (2011).

[4] Eugene, OR, Code, § 3.415(1) (2011).

[5] *AT&T Communications of the Pacific Northwest v. City of Eugene*, 35 P.3d 1029, 177 Or. App. 379 (2001), *review denied*, 52 P. 3d 1056, 334 Or. 491 (2002) ("*AT&T*"); *Sprint Spectrum v. City of Eugene*, 35 P.3d 327; 177 Or. App.

(Footnote continued . . .)

have been upheld both times. In other words, both federal *and* state courts have rejected the very kind of § 253 attacks on the City's Ordinance 20083 fees that Verizon tries to launch here.

Second, Verizon chooses to bury in a footnote (at 24 n.38) the fact that it (through its now-subsidiary, MCI) brought its own § 253 court challenge to the Ordinance 20083 fees it complains about here in federal court over four years ago. Its case was dismissed on Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), grounds almost two years ago,[7] and Verizon has apparently elected not to pursue its claim in state court. Coupled with Verizon's deliberate concealment from the Commission of two court judgments upholding the Ordinance 20083 fees against § 253 challenge, its aim is transparent: to try improperly to induce the Commission into serving as an unwitting vehicle to sidestep binding court precedent against Verizon's position.

Third, Verizon neglects to inform the Commission that Eugene's 7% ROW fee was not arbitrarily chosen but was instead based on Oregon state law, Or. Rev. Stat. § 221.515 (2009), which for over 20 years has explicitly sanctioned municipal imposition of up to a 7% fee on ILECs as compensation for use of local ROW. Thus, longstanding Oregon law reflects the judgment that gross revenue-based fees are an appropriate measure of ROW compensation.

(...footnote continued)
417 (2001), *review denied*, 52 P. 3d 1057, 334 Or. 491 (2002); *TCI Cablevision of Oregon, Inc. v. City of Eugene*, 38 P.3d 269, 177 Or. App. 443 (2001), *review denied*, 52 P.3d 1057, 334 Or. 492 (2002); *U.S. West Communications v. City of Eugene*, 37 P.3d 1001, 177 Or. App. 424 (2001), *aff'd in part and vacated in part*, 81 P.3d 702, 336 Or. 181 (2003). Verizon cites the *AT&T* case in a footnote (at 21 n.34), but curiously omits any reference to what these cases held; they rejected the § 253 arguments that Verizon makes here.

[6] *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250 (D. Or. 2002), *aff'd in part, vacated in part and remanded*, 385 F.3d 1236 (9th Cir. 2004), *cert. denied*, 544 U.S. 1049 (2005), *on remand*, 2006 U.S. Dist. LEXIS 70763 (D. Or. Sept. 15, 2006), *appeal dismissed*, No. 06-36022 (9th Cir. Jan. 6, 2009).

[7] *MCI Communications Services, Inc. v. City of Eugene*, 2007 WL 2984118 (D. Or. Oct. 9, 2007), *aff'd in part, vacated in part*, 359 Fed. Appx. 692 (9th Cir. 2009), *vol. dismissed on remand*, No. 07-6059 (D. Or. Jan. 12, 2010). Level 3 (at 30 & n.84) cites this case and complains about its impact on the proper court forum for § 253(c) ROW compensation disputes. But Level 3's quarrel is with the TIA itself, and the respect for federalism, especially in state and local fiscal tax matters, it represents. That is a delicate balance on which the FCC cannot, and should not, intrude.

Fourth, while it is true that the 1991 MCI Franchise granted MCI the right to install facilities on less than 1,000 feet of Eugene city ROW, was for a 15-year term and provided for a one-time payment of $2,300 (Verizon Comments at 18-19), Verizon overlooks that the Ordinance 20083 license MCI should have applied for (but has to date refused to apply for) at the 2006 expiration of the 1991 MCI Franchise, would have entitled MCI to install facilities on any or all City ROW it wished, rather than being strictly limited to less than 1000 feet of City ROW. Thus, the Ordinance 20083 license would, by its nature, provide access to far more City ROW, and thus be far more valuable, than the 1991 MCI Franchise. In fact, in 2007 Verizon/MCI sought to expand its use of City ROW, and knowing MCI's 1991 limited franchise had expired and Ordinance No. 20083 was in effect, still refused to complete an Ordinance 20083 ROW license application, heading instead to court, where it failed.[8]

Fifth, Verizon also ignores that because, by the terms of Ordinance 20083, the 1991 MCI Franchise was grandfathered for its remaining term, MCI actually enjoyed a preferential ROW compensation advantage over its competitors between 1997, when Ordinance 20083 was adopted, and 2006, when the 1991 MCI Franchise expired. As explained below, MCI's competitors, unlike MCI, were in fact paying the Ordinance 20083 7% ROW fee during that period.

Sixth, Verizon studiously avoids mentioning that the 1991 MCI franchise provided that the ROW fee set forth therein was *not* in lieu of, or to be credited against, any other fee, payments or taxes adopted by the City. Pursuant to that provision, MCI paid the Ordinance 20083 2% registration fee to Eugene beginning in 1998, with no apparent ill effect on MCI.

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[8] *See* text at note 7 *supra*.

After acquiring MCI, however, Verizon apparently dictated that MCI must stop paying the 2% fee, and MCI ceased paying the 2% fee at the end of 2006.

Seventh, although Verizon tries to make much of its assertion that Verizon/MCI would have to pay far more in Ordinance 20083 7% ROW fees than it did under the 1991 MCI Franchise (Verizon Comments at 19), Verizon, once again, misperceives both Ordinance 20083 and the facts. As noted above, an Ordinance 20083 license, unlike the expired 1991 MCI Franchise, would entitle Verizon/MCI to install facilities on any and all City ROW it chooses. Moreover, Verizon ignores the fact that, while MCI may own only limited landline ROW facilities in Eugene, it actually uses far more landline ROW facilities in Eugene than it owns. To earn the revenue it generates from its Eugene customers, MCI uses the Eugene ROW facilities of Qwest (now CenturyLink), the ILEC, as well as presumably CLECs, to originate and terminate its service to Eugene customers. Unlike Verizon, Ordinance 20083 recognizes that reality. Also unmentioned by Verizon is that under Ordinance 20083, it is entitled to deduct from its Eugene revenue on which the 7% ROW fee and the 2% tax are paid the amount it pays ILECs and CLECs in access or other charges for terminating or originating MCI's Eugene traffic. Eugene, OR, Code § 3.410(4) (2011).

Eighth, Verizon's self-serving, unverified and uncross-examined claim that it "decided to suspend" the plans of its CLEC affiliate, MCImetro, to build new facilities in Eugene because of the Ordinance 20083 7% ROW fee (Verizon Comments at 24) is belied by facts Verizon chooses not to mention. No fewer than eleven different telecommunications service providers owning ROW facilities in Eugene are licensed under Ordinance 20083 and pay the 7% ROW fee. And approximately 100 additional telecommunications service resellers, which use the ROW facilities of others to provide service in Eugene, are registered under Ordinance 20083 and pay

the Ordinance's 7% ROW fee, net of the cost they pay to Ordinance-licensed carriers for use of their ROW facilities in Eugene.[9] That so many other providers do pay Ordinance 20083's 7% ROW fee and provide service in Eugene is far more powerful, and reliable, evidence that Eugene's 7% ROW fee does not have a "prohibitive" effect within the meaning of § 253(a) and is "fair and reasonable" ROW compensation within the meaning of § 253(c), than Verizon's self-serving and unverifiable claim about its intentions. What providers actually do, as opposed to what they say, is a far more objective and verifiable form of evidence concerning local requirements under § 253.

Ninth, Verizon complains about the amount of fees it would have to pay under Ordinance 20083,[10] but what Verizon fails to inform the Commission is that these amounts are substantially less than the amount of ROW fees paid by several other providers to the City, including Qwest (now CenturyLink), Comcast and AT&T Long Distance.

Tenth, Verizon's claim (at 21) that "the incumbent local exchange carrier [Qwest/CenturyLink] is not subject to the same fee requirements [under Ordinance 20083] as Verizon, despite its significantly greater use of the City's public rights-of-way," is highly misleading. Qwest pays the City substantially more in Ordinance 20083 fees than Verizon claims it would have to pay. Moreover, Qwest (now CenturyLink) has paid the 7% license fee on its local exchange service revenues and the 2% registration fee on its non-local exchange

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[9] *See* "Currently Registered Eugene Telecommunications and Communications Providers Per Ordinance 20083 (1997)," *available at* http://www.eugene-or.gov/portal/server.pt/gateway/PTARGS_0_2_13635_0_0_18/providers.htm.

[10] Verizon Comments at 19. As noted above, Verizon has not paid these amounts at all because, after acquiring MCI, it unilaterally decided to refuse to pay *any* Ordinance 20083 fees to Eugene. This disproves Level 3's claim (at 12) that once a provider has deployed ROW facilities, a local government has "monopoly control" for purposes of imposing new ROW compensation levels at renewal. In fact, the opposite is true: Once a provider is in the ROW, Eugene's experience is that the provider merely refuses to pay any ROW compensation charge it does not like and dares the local government to sue it. The provider is well aware that a local government will first exhaust all reasonable avenues to ensure provider compliance before it would consider resorting to the drastic measure of trying to force a provider to cease service to the local government's residents or to remove its facilities from the ROW.

service revenues, and Qwest's non-ILEC affiliate has paid both the 7% and the 2% fees on its long distance revenues.

Eleventh, Verizon's claim (at 19) that "[i]f calculated in one manner," it would have to pay $286,000 in 7% ROW fees and $81,000 in the 2% registration fee, for "a total of more than $360,000 in annual local fees" is directly contradicted by -- and grossly inflates -- Verizon's own representations to the City concerning how much in Ordinance 20083 fees it would have to pay. In May and June of 2010, Verizon provided the City with spreadsheets and a letter stating that, for the period beginning September 2006 through May 2010, it calculated that it owed the City $44,626.13 in 7% ROW fees and $12,750.32 in 2% registration fees. In other words, Verizon has represented to the City that it owes approximately $57,000 in fees for over a three-and-a-half year period, while it now represents to the FCC that it would owe the City $360,000 annually. Both representations cannot be true. The City suggests such inconsistent manipulation of figures by Verizon to suit its needs in representations made to different government bodies indicates a deliberate lack of candor on Verizon's part -- a lack of candor that the Commission can, and should, rely on to discredit all of Verizon's claims here.

Twelfth, Verizon's statement (at 21) that Ordinance No. 20083 imposes "right-of-way fees of nine percent" is a deliberate falsehood. Verizon well knows that the City's 2% registration fee is not a ROW fee at all. It is a 2% tax imposed on all communications service providers in the City, both landline and wireless. Verizon also should know that the 1996 Telecommunications Act -- of which Sections 253, 332(c)(7) and 706 are a part -- contains a tax savings clause that provides that, except for provisions of that Act not pertinent here:

> [N]othing in this Act or the amendments made by this Act shall be construed to modify, impair or supersede, or authorize the

> modification, impairment, or supersession of, any State or local law pertaining to taxation ....[11]

Eugene's 2% tax is therefore beyond not only the scope of this proceeding, but beyond the reach of the Commission under the Act. Moreover, the Commission itself has long recognized that it would be inappropriate for it to opine on or preempt state or local taxation.[12]

In sum, Verizon's attacks on Eugene and Ordinance No. 20083 should be roundly rejected by the Commission.

II. OTHER INDUSTRY COMMENTERS' ASSERTIONS ABOUT EUGENE AND OREGON LAW ARE BOTH INCORRECT AND IRRELEVANT.

A few other industry commenters criticize either Oregon law concerning ROW fees or Eugene's Ordinance No. 20083. Again, however, their criticisms rest on misstatement, mischaracterization or turning a blind eye to court precedent against them.

CenturyLink (at 6), for instance, makes two complaints about Or. Rev. Stat. § 221.515, which permits Oregon cities to impose a 7% ROW fee on ILECs' local exchange service revenue. First, it complains that it had to sue the City of North Plains, Oregon, for adopting an ordinance that imposed a ROW fee that CenturyLink viewed as inconsistent with Or. Rev. Stat. § 221.515, a lawsuit in which CenturyLink prevailed. Second, it complains that successfully challenging Or. Rev. Stat. § 221.515 under § 253 "would be difficult" under existing precedent.

It is difficult to understand CenturyLink's complaints. Parties -- including local governments -- often have to sue to vindicate their rights, and Section 253(c) specifically

[11] Telecommunications Act of 1996, § 601(c)(2), *codified at* 47 U.S.C. § 152 note.

[12] *See, e.g., Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry, 14 FCC Rcd 12673 (1999), at ¶¶ 81 & 84; *Vonage Holdings Corporation*, 19 FCC Rcd 22404, 22405 (2004), at ¶ 1.

contemplates such litigation.[13] (By the way, large providers like CenturyLink have far more resources than almost any local government to engage in pursuing such litigation. The City has had to spend enormous sums to defend Ordinance 20083 against waves of industry lawsuits, all by providers whose resources dwarf the City's.) What option would CenturyLink prefer over having to seek remedies from the courts? That an agency or the Executive Branch unilaterally dictate what is permissible, enforced against recalcitrant parties perhaps by force of arms?

CenturyLink likewise ignores the true significance of its admission that court precedent construing § 253 would make it "difficult" to challenge Or. Rev. Stat. § 221.515's gross revenue-based ROW fee.[14] That CenturyLink's crabbed view of § 253 is not shared by the courts simply underscores the legal weakness of its position; it certainly constitutes no justification for FCC action to try to undo the considered position of the courts -- courts, we might add, that have often addressed, and thus have far more familiarity than the FCC with, the application of Section 253 to ROW matters.

NCTA also complains about Or. Rev. Stat. § 221.515, but in the opposite way from CenturyLink. According to NCTA, Oregon law is discriminatory because Or. Rev. Stat. § 221.515 caps ILEC ROW compensation at 7% of the ILEC's exchange access revenues, while Oregon Home Rule law allows cities like Eugene to impose a 7% ROW fee on non-ILECs' other telecommunications service revenues.[15]

NCTA's argument is flawed at several levels.

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[13] *See, e.g.*, Comments of National League of Cities, *et al.* ("NLC Comments") at 52-66.

[14] CenturyLink also overlooks other applicable precedent confirming the accuracy of its admission, *see* notes 5& 6 *supra*, and proceeds to give the back of its hand to still other § 253 court decisions it does not like. *See* CenturyLink Comments at 12-13 n.28.

[15] NCTA Comments at 3. Verizon (at 21) makes the same argument.

First, as Verizon (probably inadvertently) points out, the ILEC (in Eugene's case, CenturyLink, formerly Qwest) is the only "telecommunications carrier" under Oregon law subject to Or. Rev. Stat. § 221.515.[16] Most other telecommunications/broadband service providers in the City, although they compete with the ILEC, do not provide the same exchange access services as the ILEC. Thus, under NCTA's scenario, providers not subject to Or. Rev. Stat. § 221.515 would apparently pay little or no ROW compensation while the ILEC does. That would hardly be "competitively neutral" or non-discriminatory within the meaning at § 253(c).

Second, NCTA misstates the facts concerning what CenturyLink/Qwest pays under the City's Ordinance No. 20083. As noted above, CenturyLink/Qwest is required to pay the 7% ROW fee on its local exchange service revenues and the 2% tax on all of its non-local exchange service revenues, and its long-distance service affiliate must pay both fees. As also noted above, CenturyLink/Qwest pays more in Ordinance No. 20083 fees than any other provider in Eugene.

Third, and perhaps most to the point, the evidence of the number of broadband providers and broadband availability in Eugene, set forth in Eugene's opening comments at 6-9, conclusively refute any assertion that Ordinance No. 20083 or the City's ROW management or zoning practices have in any way impeded broadband deployment or availability in Eugene. Indeed, more broadly, a study submitted by NLC in its opening comments leaves no room for doubt that, whatever may be said of Oregon's ROW compensation law, it has *not* deterred broadband deployment and adoption vis-à-vis other states that have the lesser, or no, ROW compensation requirements that industry prefers. [17] And since promoting broadband

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[16] Verizon Comments at 21 & n.34 (citing *AT&T Communications v. City of Eugene*, *supra*, and Or. Rev. Stat. §§ 133.721(18) & 759.005).

[17] NLC Comments at 10-14 and Exh. C, ECONWest, *Effect on Broadband Deployment of Local Government Right of Way Fees and Practices* (July 18, 2011).

deployment, *not* the nuances of Oregon law, is the only legitimate issue before the Commission in the *NOI*, that evidence should lay to rest industry's claims about ROW compensation mechanisms in Oregon generally, and in Eugene in particular.

CONCLUSION

For the foregoing reasons and those set forth in the City's opening comments and those of other local government commenters, the Commission should terminate this proceeding.

Respectfully submitted,

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